California Building Industry Association

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September 30, 2011

Joe Grindstaff, Executive Officer
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Re: COMMENTS ON THE FIFTH STAFF DRAFT OF THE DELTA PLAN

Dear Mr. Grindstaff:

The California Building Industry Association ("CBIA") is a non-profit statewide organization representing approximately 3,200 member companies responsible for all aspects of the planning, design, construction, financing, insuring, sales and maintenance of approximately 70% of all new homes built in California each year. CBIA also negotiated portions of and ultimately supported the legislation that created the Delta Stewardship Council, the co-equal goals, and the requirement to produce the Delta Plan. CBIA respectfully submits these comments on the Delta Stewardship Council ("Council")'s Fifth Staff Draft Delta Plan, dated August 2, 2011 ("Draft Plan").

As an initial matter, CBIA is grateful for modifications that have been made to the Fourth Staff Draft Delta Plan consistent with our previous comments on the Fourth Staff Draft Delta Plan (dated June 13, 2011). However, there remain a number of other concerns that are identified in this letter. It would be helpful to us if there were reasons given as to why some suggestions were not taken, but in the absence of an explanation we reiterate some of our previous concerns.

It is well-established that when an administrative agency such as the Council implements a statutory requirement, the agency cannot act in a manner that is "inconsistent with the governing statute, alter[s] or amend[s] the statute, or enlarge[s] its scope." *California School Boards Association v. State Board of Education* (2010) 191 Cal.App.4th 530, 544; *Yamaha Corporation v. State Board of Equalization* (1998) 19 Cal.4th 1. Where an agency regulation or other action reflects an inconsistency or conflict with the governing statute, it is void and "a court has a duty to strike [it] down." *California School Boards Association v. State Board of Education*, *supra*, at 544. Furthermore, where as here, the agency's interpretation of statutory terms is not the product of quasi-legislative rulemaking but instead reflects only the agency's non-expert opinion of what the statute means, its resulting actions will be given little if any deference by a reviewing court. *Id.* at 543-544.

In CBIA's view, the Draft Plan violates these settled administrative law precepts because it conflicts with the Sacramento-San Joaquin Delta Reform Act of 2009 ("Act") in two fundamental respects: (1) The Draft Plan ignores key statutory language limiting the scope of covered actions subject to the core requirements of consistency with the Delta Plan and appealability to the Council; and (2) the Draft Plan impermissibly attempts to expand the scope of the Council's regulatory reach beyond the clear limitations expressed in the Act. CBIA's specific concerns are as follows:

<u>The Draft Plan is inconsistent with SB 5's flood protection standards</u>. SB 5 (Machado - 2007) established, for the first time, a 200-year level of flood control which must be met in urban and urbanizing areas. See, e.g., Government Code sections 65865.5, 65962 and 66474.5. Urban and urbanizing areas are areas that contain at least 10,000 people or will contain 10,000 within 10 years of project approval.

Government Code section 65007(i) and (j). SB 5 allows projects to meet the 200-year level of flood protection in 3 ways, (1) when project findings are made (see, subdivision (a)(1) of Sections 65865.5, 65962 and 66474.5); (2) by imposing conditions on the project (see, subdivision (a)(2) of Sections 65865.5, 65962 and 66474.5); or (3) by achieving the 200-year level of protection by 2025 (see, subdivision (a)(2) of Sections 65865.5, 65962 and 66474.5).

In short, SB 5 contemplates that development can continue to take place, provided that the development meets the appropriate standard. Further, in nonurban areas – areas that contain a population of less than 10,000 people and will not grow to 10,000 or more people in 10 years (urbanizing areas), the FEMA 100-year level applies regardless of the size of the project. Finally, there are more ways to achieve these levels of protection than simply relying on levees – homes may be elevated or building codes may be applied. (Health & Safety code section 50465).

Requested changes #1: CBIA believes the following changes should be made:

(1) Page 166, lines 40-42 reads:

> Therefore, to be assured consistency with the Delta Plan, future land use decisions should not permit or encourage construction of significant numbers of new residences in the Delta in the face of the flood hazards.

As written, no development would be allowed throughout the Delta (not just the Primary Zone) since it does not state any ability to mitigate to the appropriate level of flood protection. Accordingly, we suggest the sentence be modified as follows:

> Therefore, to be assured consistency with the Delta Plan, future land use decisions should not permit or encourage construction of significant numbers of new residences in the Delta in the face of the flood hazards <u>unless the decision complies with the appropriate level of flood protection.</u>

(2) Page 170, line 35 – 41:

As stated above, SB 5 requires not only "urban areas" but also "urbanizing areas" to comply with the 200-year flood protection standard. Accordingly this paragraph should add the following sentence as a footnote to the word "urban":

> As used in this Chapter, "urban" includes both urban and urbanizing areas as defined in Government Code section 65007, subdivisions (i) and (j).

Since the footnote would apply throughout the Chapter, we note that this meaning is intended to extend to "urban" as used on page 172, lines 17-19, page 173, line 9, and in Table 7-1.

(3) Page 175, first row reads:

Basis for Minimum Levee Design Classifications

Since SB 5 doesn't limit achievement of applicable level of flood protection to levees only, we suggest a change to read as follows:

Basis for Minimum Level of Flood Protection

(4) Page 175:

The term "non-urbanized" is used through out. We suggest that "non-urbanized" be clarified with a footnote that indicates:

As used in this Table, "non-urbanized" does not include "urbanizing areas" as defined in Government Code section 65007(j).

(5) Page 175, row 7, Class 5:

The Delta Plan in other places references Water Code section 85032(j) for the proposition that the law does not affect the liability of the State for flood protection in the Delta or its watershed. Additionally, the plan also states that the Delta Plan shall not be construed to effect a taking or affect the rights of any property owner under the State or Federal Constitutions. (Page 56, lines 31-35.) The U.S. Supreme Court in Lucas v. South Carolina Coastal Council 505 US 1003, 1018 (1992) and Dolan v. City of Tigard 114 S.Ct. 2309, 2316 and the Ninth Circuit Court of Appeal (Del Monte Dunes at Monterey, LTD v. City of Monterey 95 F.3d 1422, 1432 have all stated that compensation is required where regulations "leave the owner of land without economically beneficial or productive options for its use – typically…by requiring land to be left substantially in its natural state – [which suggests] that private property is being pressed into some form of public service under the guise of mitigating serious public harm."

Accordingly, CBIA believes that the provision should be deleted as follows:

> ~~These developments are highly discouraged and may be inconsistent with the Delta Plan regarding protection of lands that are or could be used for agriculture and/or ecosystem~~.

(6) Page 172, lines 17 – 19, contains the following statement:

> Urban development in the Secondary Zone should be confined to existing urban spheres of influence where the 200-year design standard will take effect by 2025.

CBIA believes that this statement implies that projects outside of these areas are to be prohibited. For the reasons explained in paragraph (5), this provision should be deleted:

> ~~Urban development in the Secondary Zone should be confined to existing urban spheres of influence where the 200-year design standard will take effect by 2025.~~

The deleted language should be replaced with:

> Plans, programs or projects within incorporated cities, their spheres of influence, the Mountain House GP Community Boundary, and within urban limit lines should be exempt from Table 7-1.

In our comment letter on the Fourth Staff Draft Delta Plan (Previous Comment Letter), we identified a concern that the Draft Plan interferes with CEQA. In Policy GP1, p. 60, we are concerned that the language may be interpreted to require the identification of all potentially adverse impacts – whether significant or not – and that they be fully mitigated. We proposed **Requested Change #3** (as numbered in our in our Previous Comment Letter) as one way to clarify this ambiguity. Please note that, due to changes to the Fourth Staff Draft Plan, what was the first bullet is now the second bullet in the Fifth Staff Draft Plan. Accordingly, the **Requested Change** should now be applied to the second bullet of Policy GP1, not the first bullet. We refer you to the discussion of this issue in our previous comment

letter for a fuller explanation. As an alternative approach, one could simply require a project to provide proof of compliance with CEQA by providing a Notice of Determination.

Additionally, in our Previous Comment Letter we identified a concern that, notwithstanding Water Code section 85057.5, the Draft Delta Plan does not provide adequate protection of vested rights – particularly with respect to development agreements and vesting tentative maps. We proposed **Requested Change #4** (as numbered in our Previous Comment Letter) as one way to clarify this ambiguity. We refer you to the discussion of this issue in our previous comment letter for a fuller explanation.

The Draft Plan (G P1, third bullet, p.60) improperly purports to require all covered actions to "document use of best available science." This is a significant new substantive regulatory requirement not in the Act itself and far exceeds the Council's authority to administer consistency review – particularly as it may be applied to project proponents or local governments who certify consistency.

Requested Change #4: Eliminate this language by striking the third bullet to G P1 (p. 60) in its entirety.

The Draft Plan improperly characterizes the nature of the advisory reviews conducted pursuant to Water Code section 85212. Appendix B of the Draft Plan (pp.10-12) recognizes that plans, programs, projects and activities within the secondary zone of the Delta that the applicable MPO determines are consistent with the Sustainable Communities Strategy ("SCS") component of a Regional Transportation Plan ("RTP"), or an Alternative Planning Strategy ("APS"), are not covered actions. Appendix B suggests, however, that they are subject to a "separate requirement and process for consistency review by the council of these types of local and regional planning documents."

This language is misleading and should be changed to reflect the fact that, except with respect to the adoption of a draft SCS or APS, the Council's actions pursuant to section 85212 are strictly limited to providing "input" and "advice" regarding consistency with the adopted Delta Plan. Section 85212 should not be identified as creating a "separate requirement and process for consistency review." In Water Code section 85022, the Legislature expressed its clear intent to require only covered actions to be consistent with the Delta Plan: "It is the intent of the Legislature that state and local land use actions, identified as 'covered actions' pursuant to 85057.5 be consistent with the Delta Plan." The corollary is that all other state and local land use actions are not required to be consistent with the Delta Plan and are not subject to "consistency review" as that phrase is used in the Act. Finally, with respect to adoption of the RTP (of which the SCS is an element), it is by statute not a covered action and not required to be consistent with the Delta Plan. Section 85212 only requires the MPO to "consult" with the Council "relating to the council's advice" about the relationship between a draft SCS or APS and the Delta Plan. This section does not establish a separate consistency requirement for the RTP, the SCS or an APS. It simply provides that the MPO must provide a "detailed response" to the Council if the Council makes a "claimed inconsistency" with respect to the draft SCS or APS and the Delta Plan.

Requested Change #5: Use the phrase "consultation and advice" to describe the Council's actions pursuant to Section 85212 rather than "requirement and process for consistency review."

The Act contains seven statutory exemptions from covered actions in Water Code section 85057.5, but the Draft Plan identifies and discusses only a select few (p. 58). This omission precludes a complete understanding of the Act's covered action provisions.

Requested Change #6: The Draft Plan should identify each of the Act's statutory exemptions from the definition of covered action (Water Code section 85057.5(b)(1)-(7)) and make clear that each

exemption forms an independent basis for exclusion from the definition of covered action and therefore from the requirement of consistency review with the Delta Plan.

Thank you for considering our concerns and requested changes. If you have any questions regarding these comments, we would welcome the opportunity to discuss them with you.

Sincerely,

Richard Lyon

Nick Cammarota